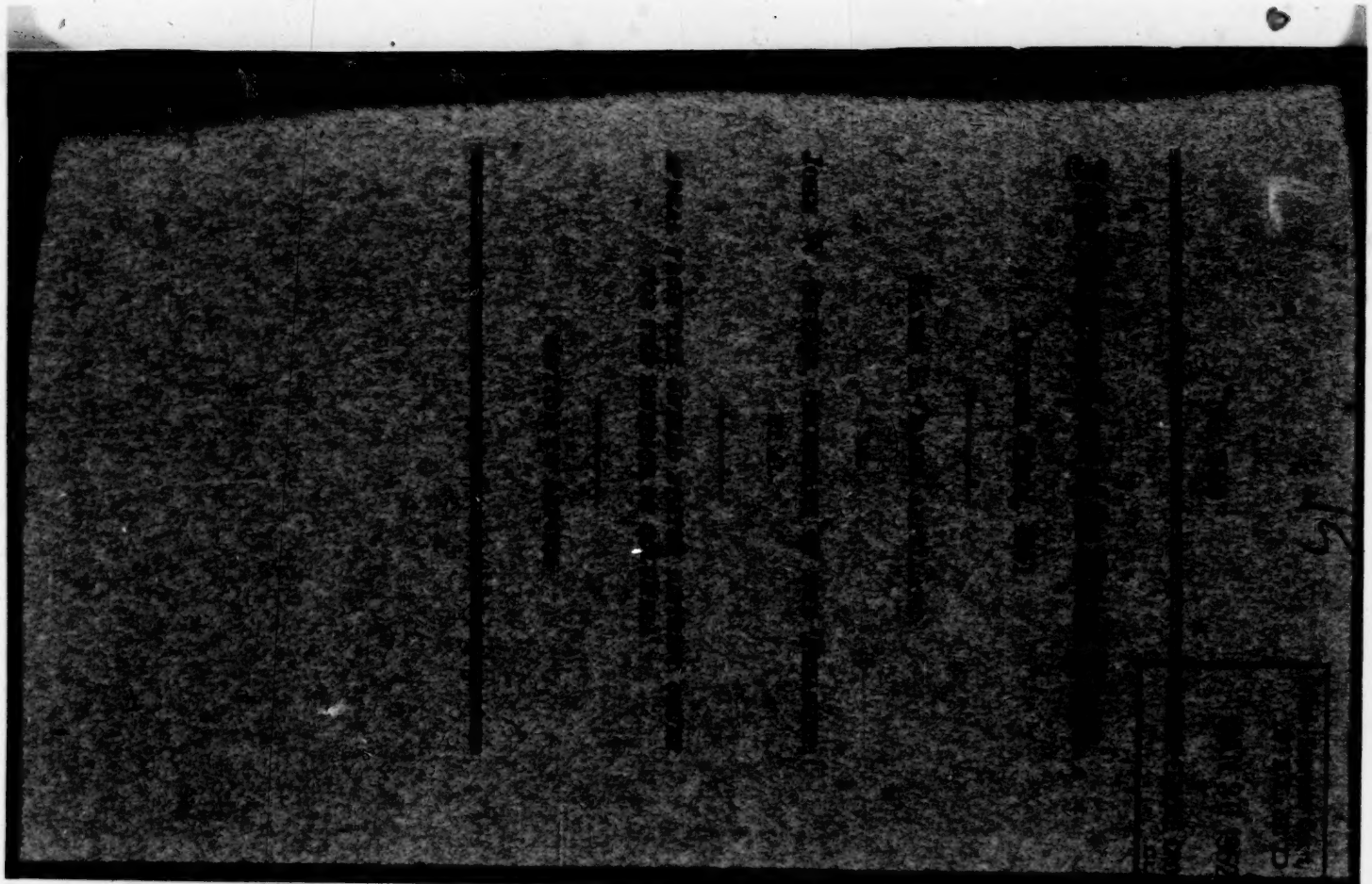

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil No. 4576-51

HAYES L. COMBS, PLAINTIFF-APPELLANT

v.

JOHN W. SNYDER, SECRETARY OF THE TREASURY, JOHN B. DUNLAP, COMMISSIONER OF INTERNAL REVENUE, AND GEORGE HOFFERBERT, COLLECTOR OF INTERNAL REVENUE FOR BALTIMORE, MARYLAND, DEFENDANT-APPELLEES

MOTION TO AFFIRM

(Filed)

Pursuant to Rule 7, paragraph 4, and Rule 12, paragraph 3, of the Revised Rules of the Supreme Court of the United States, appellees move that the judgment of the District Court be affirmed.

This is a direct appeal under 28 U.S.C. 1253 from the final judgment, entered on November 29, 1951, of a specially-constituted three-judge United States District Court convened pursuant to 28 U.S.C. 2282 and 2284, denying plaintiff-appellant's motion for a preliminary injunction and granting the defendant-appellees' motion to dismiss the complaint. Appeal was allowed and appeal papers were served on December 28, 1951.

The complaint and motion for a preliminary injunction filed by appellant in the District Court sought the intervention of a court of equity to pre-

vent the enforcement of Chapter 27A of the Internal Revenue Code (Sections 3285-3298), as added by Section 471 of the Revenue Act of 1951 (Public Law 183, 82d Cong., 1st. Sess.). This Chapter imposes a 10 per cent excise tax on wagers, as defined, and an occupational stamp tax of $50 a year on persons liable for the excise tax. The statute also requires such persons to register their names, residences, and places of business; and the names and residences of persons who receive wagers for them or for whom they receive wagers. Violation of the law is subject to criminal penalties.

The complaint alleged, in substance, that appellant "is desirous of engaging in the business and occupation covered by Chapter 27A of the Revenue Act of 1951"; that he tendered $50 and applied for a special tax stamp, but that the stamp was not issued because he failed to furnish the information as to his place of business, etc., required by the law; that if he were to furnish such information, it "might tend to incriminate him of violation of the laws of the United States"; that Chapter 27A is unconstitutional; and that appellant has no adequate remedy at law and is entitled to an injunction prohibiting appellees from administering the provisions of Chapter 27A and enforcing them against him.

The District Court denied appellant's motion for a preliminary injunction and dismissed the

complaint. Its opinion stated that, while the three judges "think the Act constitutional", it is "unnecessary to discuss the constitutional questions in the circumstances of this case." The court rested its decision on equitable grounds. The opinion summarized them as follows:

> The complaint clearly implies and plaintiff's counsel conceded in oral argument, that what plaintiff seeks is the intervention of the court for the protection of a criminal business. Nothing is better settled than that it is within the discretion of a court of equity to deny its aid to one who does not come into court with clean hands. Few things are clearer than that one who comes seeking protection for conduct that he concedes to be criminal has unclean hands within the meaning of this principle.

The Government submits that this holding of the District Court is so clearly correct as to justify summary affirmance of the judgment below. Apart from the merits of his attack on the validity of Chapter 27A,[1] appellant has failed to present sufficient basis for invoking the extraordinary equitable remedy of enjoining the enforcement of a federal tax statute.

Section 3653 (a) of the Internal Revenue Code (26 U.S.C. 3653) provides, with exceptions not

[1] The constitutionality of the tax imposed by Chapter 27A is supported by numerous decisions. E.g., *United States* v. *Sanchez*, 340 U.S. 42; *Sonzinsky* v. *United States*, 300 U.S. 506; *United States* v. *Doremus*, 249 U.S. 86; *Nigro* v. *United States*, 276 U.S. 332; *Helvering* v. *Mitchell*, 303 U.S. 391. Cf. *Lipke* v. *Lederer*, 259 U.S. 557; *United States* v. *Constantine*, 296 U.S. 287.

pertinent here, that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court." Only extraordinary and exceptional circumstances warrant an exception to the statute, as well as to the rule generally followed in equity that a suit will not lie to restrain collection of a tax upon the sole ground of its illegality. *Miller* v. *Nat Margarine Co.*, 284 U.S. 498. No such circumstances are present here. On the contrary, as the District Court pointed out, appellant is in effect asking a court of equity to aid and protect him in carrying on a criminal business. Such a plaintiff has no standing before the chancellor. A court of equity cannot in good conscience invoke its extraordinary power on behalf of "a plaintiff who seeks to invoke that power for the purpose of consummating a transaction in clear violation of law." *Johnson* v. *Yellow Cab Co.*, 321 U.S. 383, 387; see also *Precision Co.* v. *Automotive Co.*, 324 U.S. 806.

For the foregoing reasons, it is clear that this appeal presents no substantial question, and that the judgment of the District Court should be affirmed.

Respectfully submitted.

PHILIP B. PERLMAN,
Solicitor General.

JANUARY 1952.

U. S. GOVERNMENT PRINTING OFFICE 1952

Office - Supreme Court, U. S.
FILED
JAN 3 1952
CHARLES ELMORE CROPLEY

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1951

No. 560

HAYES L. COMBS,

Appellant,

vs.

JOHN W. SNYDER, SECRETARY OF THE TREASURY, ET AL.,

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

APPELLANT'S BRIEF IN OPPOSITION TO MOTION TO AFFIRM

MYRON C. EHRLICH,
Counsel for Appellant.

JOSEPH SITNICK,
Of Counsel.

OPPOSITION

BRIEF

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 560

HAYES L. COMBS,

Appellant,

vs.

JOHN W. SNYDER, SECRETARY OF THE TREASURY, JOHN B. DUNLAP, COMMISSIONER OF INTERNAL REVENUE, AND GEORGE HOFFERBERT, COLLECTOR OF INTERNAL REVENUE FOR BALTIMORE, MARYLAND,

Appellees

BRIEF IN OPPOSITION TO MOTION TO AFFIRM

The motion to affirm was served on Appellant on January 12, 1952. The Statement of Jurisdiction contained in the transcript includes many of the contentions of the Appellant that Chapter 27(a) of the Revenue Act of 1951 is unconstitutional. It is deemed not necessary that the contentions made therein be repeated in this brief in opposition to the Motion to Affirm. However, certain statements contained in the Motion to Affirm, not heretofore made in the lower court, are answered in this brief.

The Motion to Affirm states that the District Court in denying the Appellant's motion for preliminary injunction and dismissing the complaint held "that, while the three judges 'think the Act constitutional', it is 'unnecessary to

discuss the constitutional questions in the circumstances of this case'," The opinion of the District Court stated further:

> "we think some of the constitutional questions the Plaintiff asks us to decide are substantial enough to give this three-judge court jurisdiction."

The Motion to Affirm quotes from the opinion of the District Court as follows:

> "The complaint clearly implies and plaintiff's counsel conceded in oral argument, that what plaintiff seeks is the intervention of the court for the protection of a criminal business. Nothing is better settled than that it is within the discretion of a court of equity to deny its aid to one who does not come into court with clean hands. Few things are clearer than that one who comes seeking protection for conduct that he concedes to be criminal has unclean hands within the meaning of this principle."

It is conceded that the opinion of the District Court contains the above quotation. The transcript of the proceedings, however, shows that the opinion of the District Court was not in conformance with what transpired in the court below. Apparently the court relied on the following language in the transcript of the argument below:

> Judge Edgerton (Tr. p. 22): "I understand you do not only concede, but assert, that you are violating the gambling laws of the District of Columbia. When I say "you", I am using the word in the usual, technical sense of your client; I do not mean it personally.
>
> Mr. Ehrlich: I do not say that in the complaint. I say that he wants to do it, but he does not want to do it without the occupational tax."
>
> Judge Edgerton (Tr. p. 23): "It is your view that you are likely to be hurt by the administration of the Act, because if the Act is administered as drawn, it will disclose the nature and location of the criminal

activities which your client is carrying on. That is what you say in substance?

Mr. Ehrlich: Yes, Your Honor."

Judge Edgerton (Tr. p. 43-44): "There is a question I want to ask, Mr. Ehrlich, which there must be some answer to, because the Government, I think, does not raise the point in its motion to dismiss. Perhaps it does. I didn't see the motion until this morning.

The question I want to raise is this. We all know that generally and broadly speaking a plaintiff who, on the face of his pleadings, concedes or is shown to be violating a criminal law, and who asks a court equity for an injunction, to assist him, to make it safer, cheaper, easier, more comfortable for him to violate criminal law, does not get his injunction. The old legal lingo for it, as you know, is the clean-hands doctrine.

As I say, since the Government doesn't raise the point, I think there must be some answer to it. But if you know the answer, will you tell me, why isn't he barred by the clean-hands doctrine?"

(Tr. p. 45) ". . . that the complaint says in substance that the reason plaintiff will be hurt if Chapter 27(a) is enforced against him is that its enforcement will expose the nature and location of the plaintiff's criminal activities.

Now I am asking you if you can tell me, if you know, why we have here an exception to the general principle or proposition that equity will not give relief where the relief desired is the protection, the safeguarding, the assistance of criminal activities.

Your view must be, since the Government said nothing the Govrenment view must be, that this is an exception.

Mr. Ehrlich: May I answer that. Isn't that exactly what happened in Lipke against Lederer? The plaintiff came in to restrain the United States Government, the collector of taxes. He had committed a criminal offense. And he said, "I don't believe the collector of taxes ought to enforce Section 35 of the Prohibition

> Act against me even though I have committed this criminal offense, because the tax is a penalty.
>
> Judge Edgerton: That may be; that may be an exception of that sort."

But the Appellant has not in this action sought the intervention of the District Court for the protection of a criminal business nor has he sought equitable relief with respect to the applicability to him of the gambling statutes of the District of Columbia which are statutes of the United States. Substantially what this Appellant seeks is a determination of the constitutionality and applicability to him of Chapter 27(a) of the Revenue Act of 1951.

The Appellee raises for the first time in his Motion to Affirm the lower court that apart from the merits of Appellant's attack on the constitutionality of Chapter 27(a) of the Revenue Act of 1951, Appellant's complaint and motion for a preliminary injunction should have been dismissed because his case falls within Section 3653(a) of the Internal Revenue Code which provides that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court." In answer to this it is contended that this section of the code is without application to the facts in this case for the reason that Chapter 27(a) of the Revenue Act of 1951 demands from him no tax but imposes a penalty for an alleged criminal act in violation of other Federal criminal statutes; therefore Appellant does not seek to restrain the assessment or collection of any tax, but seeks to restrain the enforcement of an unconstitutional statute which imposes a penalty in the guise of a tax and this means adopted for imposing a penalty is contrary to the Federal constitution and Chapter 27(a) of the Revenue Act of 1951 is unconstitutional. *Lipke* v. *Lederer*, 259 U. S. 557, 559.

Appellee further suggests that only extraordinary and exceptional circumstances warrant an exception to the statute as well as to the rule generally followed in equity that a suit will not lie to restrain collection of a tax upon the sole ground of its illegality, and in support of this proposition cites several cases. To this contention Appellant replies that a reading of the cases as cited by the Appellee will show that those cases, to the contrary, support Appellant's position. In determining whether or not Section 3653(a) of Title 26, U.S.C. has application to this suit it must be remembered that the dispute as to the propriety of a suit in equity must be resolved in the light of the nature of the controversy. The Appellant in good faith believes that an unconstitutional burden is laid directly upon the business and occupation covered by Chapter 27(a) of the Revenue Act of 1951. Appellant is entitled to have a determination of the question whether Chapter 27(a) of the Revenue Act of 1951 is applicable to him. Appellant is not bound to be subject to pains and penalties criminal and civil in order to have this question settled if in truth Chapter 27(a) imposes a penalty in the guise of a tax. And if the Appellant is right that the statute is unconstitutional as applied to him, he ought not to have to incur pains and penalties criminal and civil in order to have the question settled. It is submitted that the extraordinary circumstances which exist in this case justify resort to equity and Section 3653(a) of Title 26, U. S. C. does not oust this jurisdiction. The statute is inapplicable in exceptional cases where there is no plain, adequate and complete remedy at law and the facts in this case as set forth in the Statement of Jurisdiction clearly show the absence of any such remedy. *Allen* v. *Regents*, 304 U. S., 439, 448-449.

Attention is also called to the case of *Tovar* v. *Jarecki*, 173 F. 2d 449, 451, Seventh Circuit per Minton, Jr., where it was stated that:

> "We hold that this section of the statute under which this plaintiff was assessed is a penal statute and not a tax statute. Since it is a penalty inflicted without a hearing and not a tax, Section 3653 of the Internal Revenue Code has no application. The Supreme Court has said in *Lipke v. Lederer*, 259 U. S. 557, 561, 42 S. Ct. 549, 66 L. Ed. 1061, that statutes like the instant statute are penal and that a court of equity may enjoin the assessment and collection of such penalty, notwithstanding Sec. 3653. In that case, the Court said:
>
> 'The mere use of the word 'tax' in an act primarily designed to define and suppress crime is not enough to show that within the true intendment of the term a tax was laid. Child Labor Tax Case ante, 20. When by its very nature the imposition is a penalty it must be so regarded. *Helwig* v. *United States*, 188 U. S. 605, 613. Evidence of crime (§ 29) is essential to assessment under § 35. It lacks all the ordinary characteristics of a tax, whose primary function 'is to provide for the support of the government' and clearly involves the idea of punishment for infraction of the law—the definite function of a penalty. O'Sullivan v. Felix, 233 U. S. 318, 324.'"

It is further urged that Judge Edgerton's remarks to Appellant's counsel in the District Court clearly, if unwittingly, confirmed Appellant's position:

> Judge Edgerton (Tr. p. 41): "So that all the pains and penalties can be avoided by the client by the simple expedient of abstaining from the gambling business.
>
> That is true, is it not?
>
> Mr. Ehrlich: Yes, Sir."

In other words, the court suggests that abstaining from the business or occupation covered by the Act is the only

way to avoid pains and penalties which will be imposed by compliance with Chapter 27(a). However, such abstinence would clearly defeat the alleged purpose of the Act, namely to collect taxes. Abstinence being the only means for Appellant to avoid pains and penalties by compliance with Chapter 27(a), clearly discloses that this statute imposes a penalty and not a tax. As was stated in *Tovar* v. *Jarecki, supra,*

> "We think it quite plain that this statute is a penal and not a revenue-raising statute. * * * Is it not perfectly plain that *why* the Government is trying to do is to take this plaintiff's property and turn him and his family out in the street for not having a license to do something the Government did not want him to do?"

The cases cited in the Motion to Affirm as authority for the constitutionality of the tax imposed by Chapter 27(a) do not sustain that motion but to the contrary are authority for the Appellant's contentions.

WHEREFORE, for the herein stated reasons and for the reasons contained in the Statement of Jurisdiction, it is clear that this appeal presents substantial constitutional questions; that Chapter 27(a) of the Revenue Act of 1951 is unconstitutional; that Sec. 3653(a), Title 26, U. S. C. is not applicable to this case and that the judgment of the District Court should be reversed.

Respectfully submitted,

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